No. 86-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRANK M. WANLESS,
Petitioner,

vs.

RHONDA ROTHBALLER and THE PEORIA JOURNAL STAR, INC.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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STATEMENT OF THE CASE

Rhonda Rothballer, a reporter for The Peoria Journal Star, was asked by her supervisor to look into the controversy in the Village of Morton regarding alleged conflicts of interest which he had read about in the Tazewell County News. During the course of her investigation Rothballer interviewed the petitioner, Frank Wanless; Brett Bode, Tazewell County State's Attorney; Bode's successor, State's Attorney Bruce Black; Eugene Mathis, Mayor of the Village of Morton; Alfred Heininger, former Village Mayor; Village of Morton Trustees, Lee Hinnen, Bud Zobrist, Henry Grim, Jack Taylor and Ruth Ferguson; Morton Village Clerk, William Klopfenstein; William Roecker, Village of Morton Planning Commission; Morton attorney, An-

thony Corsentino; Ken Black, Attorney for the City of Washington, Illinois; Ludwig Kohlman, Attorney for the Better Government Association; Morton landowners Ray Litwiller and Ralph Giancinti; various clerks in the Attorney General's office, the Illinois State Bar Association office, the Tazewell County Clerk's office and the Morton Village Hall. Upon completion of her investigation Rothballer wrote the articles in question which were published on January 20, 1977. The petitioner did not contact anyone at The Peoria Journal Star prior to filing suit for libel on December 29, 1977.

At trial the petitioner admitted that he prepared annexation papers for persons who wanted to annex to the village and that he charged those persons a fee for this service. He also admitted that it was his official duty as village attorney to attend Village Board meetings and to examine and approve all legal documents presented to the Board. The Village Board would not act on any document unless the petitioner gave his approval. The petitioner was paid by the village to perform these legal services. Rothballer thought that petitioner's examination of annexation documents which he had prepared was a part of the service involved in preparing them and since he was also paid by the village for performing this service she concluded that petitioner was paid twice for the preparation of annexation papers.

When Rothballer requested copies of petitioner's legal bills from the Village Clerk she was given non-itemized statements. The petitioner testified that he submitted non-itemized time bills to the village but detailed time reports to Trustee Lee Hinnen, whose job it was to approve his bills. Mr. Hinnen identified certain itemized statements at trial which he said were typical of petitioner's bills to him.

The petitioner prepared a rezoning ordinance for the Village of Morton which included 35 acres of land owned by his wife whereby his wife's land was rezoned from R-1, single family, to R-3, multiple family. According to the petitioner this was done in a periodic rezoning to bring the zoning map up-to-date. The

petitioner testified that he did not believe there was any change in the value of the land by the rezoning but there was really no way you could tell. Ruth Ferguson, Village Trustee; Rich Karnock, Superintendent of Public Works and Ralph Giancinti, a land developer, told Rothballer the rezoning increased the value of the land. Rothballer thought it was common knowledge that a rezoning which increased the potential use of land increased the value of the land. One year after petitioner was no longer Village Attorney his wife's 35 acres of land was rezoned back to R-1.

Lloyd "Bud" Zobrist, Village Trustee, was a land developer and part owner of Waldheim subdivision through a partnership known as WRCL. He did not testify at trial although he was the managing partner. The petitioner had a relationship as attorney for the Zobrist family dating back to the 1950's and was the registered agent for several Zobrist corporations. Another land developer, Solly Ackerman, complained to Village Trustees Ferguson and Taylor that the village extended the sewer line to the subdivision being developed by Trustee Zobrist without charge but he had to pay to have the sewer line extended to his subdivision. Trustee Taylor testified that the city expended funds to extend the sewer line to the WRCL development which he did not believe to be the normal procedure. Trustee Ferguson testified that the village used $20,000 in public money to bring the trunk line to the Waldheim Subdivision being developed by WRCL Co. According to her investigation Solly Ackerman had to pay that expense himself as a developer.

Ordinance No. 667, prepared by petitioner, removed Waldheim Subdivision and three or four parcels of farmland from the sewer assessment roll and provided instead for a sewer connection fee. This fee was payable when a lot owner hooked up to the sewer or when the Village Board accepted certification by its engineer that the lot was available to be served by the sewer. There was no evidence that WRCL ever paid any sewer connection fee prior to the time that the article in question was published. The conclusion of Rothballer that the sewer system

was provided without cost to WRCL Co. was based on the fact that the trunk line was built with public funds and on the deferred aspect of the sewer connection fee which allowed it to be passed on to the buyer of the lots.

With respect to the issue of conflict of interest, the petitioner told Rothballer that his definition of a conflict of interest was any proposal that wasn't in harmony with what the village wanted done. Trustee Taylor testified that petitioner had the practice of representing private individuals before the City Planning Commission or the Village Board for which he was the attorney. He discussed this particular activity with the petitioner privately and was informed that it had been approved by the Board. Three members of the Village Board also served on the Planning Commission. Trustee Ferguson testified that she objected to the Village Attorney representing a person coming to the village to annex or do business with the village. She tried to get the Village Board to change this procedure but was not successful.

Under the law of the case, pursuant to the first opinion of the Third District Appellate Court upon appeal from a summary judgment for the respondents, the issue as to whether petitioner's conduct amounted to a conflict of interest was a question of fact for the jury. App. at A-50. At trial Brett Bode and Bruce Black, State's Attorneys for Tazewell County; Jack Teplitz, former Corporation Counsel for the City of Peoria; Howard Braverman, General Counsel for the Illinois State Bar Association; Ludwig Kohlman, attorney for the Better Government Association and Anthony Corsentino, attorney residing in the Village of Morton, all testified that in their opinion the conduct of petitioner amounted to a conflict of interest. The petitioner and Harold Kuhfuss, former attorney for the City of Pekin, testified that it was not.

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* Pursuant to Supreme Court Rule 28.1, please be advised that The Peoria Journal Star, Inc. has no parent corporation. It owns all of the stock of PJS Publication, Inc. and approximately 13 percent of the stock of Peoria Development Corporation.

ARGUMENT

The petitioner wants the Court to accept this case for review, declare the doctrine of independent *de novo* review unconstitutional and adopt a set of rules which will guide lower courts and litigants to a proper and more consistent application of the law to the facts. The respondents respectfully submit that this Court should not reverse itself and declare two decades of its rule making unconstitutional. Nor should this Court consider abdicating or renouncing the right and duty of courts of review to examine the matters in dispute and independently decide whether First Amendment rights have been honored or violated. *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Garrison v. Louisiana,* 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); *Bose v. Consumer's Union of the United States, Inc.,* 692 F.2d 189 (1st Cir. 1982), *aff'd.* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), *rehearing denied,* 467 U.S. 1267, 104 S.Ct. 3561, 82 L.Ed.2d 863 (1984).

Both the Illinois Appellate Court and the Illinois Supreme Court carefully followed the mandate of this Court as set forth in the above cases. Both Illinois courts recognized that they could not invade the province of the jury and consider the demeanor or credibility of the witnesses or reach decisions contrary to that of the jury as to historical or discrete facts. Because of that extreme deference to the *presumed* findings of fact by the jury, the Illinois courts did not even consider the substantial showing of truth presented by the respondents on the matters in dispute.

Petitioner asserts that neither of the Illinois courts of review challenged the adequacy or correctness of the instructions given to the jury and questions whether an independent *de novo* review is even necessary when the jury has been properly instructed on the issues. If this statement is meant to imply that either court examined or approved the instructions to the jury

the implication is false. Respondents tendered a special interrogatory to be answered by the jury regarding Rothballer's subjective awareness of falsity which was refused. The respondents also tendered four instructions defining the term "reckless disregard" to differentiate it from the common understanding of the phrase "reckless conduct". These instructions were also refused. Neither of the Illinois courts of review found it necessary to consider these rulings of the trial court since eight of the nine justices agreed that the evidence of actual malice was not clear and convincing.

The evidence which petitioner relied on as proof of actual malice is that the reporter was inexperienced; she relied on information furnished by two minority members of the Village Board who disagreed with the petitioner; the petitioner was not informed of the matters to be published in advance; the editor decided to publish without considering whether the articles were true or false and the decision to publish was made in a two-minute conference which did not comport with the usual standards of journalism.[1] Both the Illinois Appellate Court and the Illinois Supreme Court agreed that this evidence of actual malice was not clear and convincing. In his lone dissent Justice Goldenhersh opined that Rothballer was guilty of actual malice in failing to check information obtained from sources opposed to petitioner in a heated political campaign. App. at A-19. Respondents respectfully submit that any such rule as this would substantially reduce if not squelch the flow of information available to the electorate during a political campaign in violation of the First Amendment.

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[1] The unqualified statement that the decision to make the publication in question was made in a two-minute conference which did not comport with the usual standards of journalism is another example of the extreme deference by the Illinois courts of review to the fact-finding function of the jury. The following is a verbatim transcript of the testimony on this point which puts the statement in context:

Petitioner's argument that respondents were guilty of actual malice in publishing the views of the minority trustees regarding matters of public interest without first consulting neutral sources to verify their conclusions is similar to that of Justice Goldenhersh. Factually, it assumes that there is such a thing as a neutral source; that the neutral source is in a position to know and is informed; that the source has an opinion on the matter and that the conclusion of the source is completely objective. Any such person or source would be very difficult to find. Respondents submit that such an obligation on the press before publishing is patently unconstitutional in addition to being an insurmountable burden. St. Amant was not guilty of reckless disregard for the truth in relying on information supplied by just one informant who was a member of a dissident group which was engaged in an internal power struggle in the union to which he belonged. *St. Amant v. Thompson,* 390 U.S. 727, 733, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Further, petitioner's reliance on *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 789 (1967) for the duty to verify information is misplaced for many reasons, including the obvious dissimilarity of the sources of information. Respondents' sources were not only numerous, they were also in a position to know the facts.

The Petition for Writ of Certiorari does not show any special or important reason for granting certiorari as required by Supreme Court Rule 17.1. There is no need for further guidance in order for lower courts to properly conduct an in-

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Q Do they run stories — which could do damage to the person being written about on the two-minute interview to decide whether it should be published? Is that the usual standard of journalism?

A Well, there was a great deal more that went into it than a two-minute discussion.

Q Sir, would you answer my question?

A That is not the usual standard of journalism.

dependent *de novo* review of the evidence relevant to the issue of actual malice without violating the Seventh Amendment to the Constitution of the United States. The law is already manifestly clear that in public official libel cases the fact finder decides the questions of historical or discrete facts. Both the Illinois Appellate Court and the Illinois Supreme Court gave due regard to the presumed findings of fact by the jury and carefully followed the mandate of this Court in their review of the evidence relating to the issue of actual malice. The denial of the Petition for Writ of Certiorari would furnish all of the guidance needed on the issues raised in said petition.

CONCLUSION

Wherefore, the respondents, Rhonda Rothballer and The Peoria Journal Star, Inc., respectfully submit that the Petition for Writ of Certiorari to the Supreme Court of Illinois filed by the petitioner, Frank M. Wanless, should be denied.

Respectfully submitted,

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